UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor JANE DOE, on behalf of herself and others similarly situated; JANE ROE and JANE MOE on behalf of themselves and others similarly situated; and JANE POE, Plaintiffs, v. ALEX M. AZER II, *et al*., Defendants.	Civil Action No. 17-cv-02122 (TSC)

DEFENDANTS' OPPOSITION
TO PLAINTIFFS' RENEWED MOTION FOR CLASS
CERTIFICATION AND A PRELIMINARY INJUNCTION

Plaintiffs' renewed motion for class certification and request for a preliminary injunction miss the forest for the trees. Aside from their blatant effort to provide supplemental briefing in support of their previously-filed class certification motion – an attempt made without leave of court – Plaintiffs' contention that an unknown number of new potential plaintiffs, and therefore class members, exist throughout the country fails to acknowledge that the individuals whose rights Plaintiffs seek to protect includes persons with myriad case-specific distinctions that render them unfit for class treatment. Ab initio, the known Plaintiffs' claims are moot, and they have lacked a viable class representative for several months. Many of these individuals are no longer subject to the Office of Refugee Resettlement ("ORR") policies, inasmuch as they are no longer detained, or already obtained abortions. Plaintiffs' motion is unclear on whether any known qualifying class members indeed exist. We previously stated that Plaintiff Rochelle Garza cannot adequately represent the putative class because Jane Doe, the UAC whom Ms. Garza once represented as a

guardian ad litem, had an abortion, was then placed with a sponsor on Tuesday, January 15, 2018, and reached the age of majority. Ms. Garza's claims are moot – and now, recognizing that, Plaintiffs have proposed to remove Ms. Garza as a plaintiff. If Ms. Doe was a named plaintiff independent of Ms. Garza, her claims would be moot, too. Ms. Roe, being age 19, was never a class member, and her subsequent release from ORR custody moots her claims. Ms. Moe similarly does not qualify as a class member because she, too, has been released from ORR custody to a sponsor, and has presumably exercised whatever rights she may have to an abortion. Ms. Poe, of course, has never wanted to be a class representative and has already obtained her abortion. The sponsorship placements and abortions obtained by the named plaintiffs (or the UACs whom they represented) also reinforce why they cannot establish the other requirements for class certification.

Furthermore, each putative class members' claim requires individual attention and review, and does not lend itself to a one-size-fits-all result. The documents Plaintiffs cited also do not support their primary coercion contention. The documents Plaintiffs cite in fact show that Defendants employ reasonable, case-by-case methods in an effort to act in the best interests of minors regarding any and all abortion-related procedures, including discussing their situation and options with their families, as well as the medical details of the procedures they seek. This is not "coercion," but rather responsible medical, social, and ethical behavior when dealing with minors who may not understand the nature of the action they are requesting, especially the potential lifelong emotional and medical consequences thereof. The Supreme Court has previously and unequivocally authorized engaging in such efforts to protect the best interests of minors.

There are also too few pregnant UACs requesting abortions to establish numerosity. The common constitutional questions alleged in the Second Amended Complaint are incapable of generating common answers – and supporting class certification – because ORR's care of each pregnant UAC requesting an abortion depends on the facts and circumstances unique to the UAC.

For example, the alleged potential Plaintiffs are of differing ages, may be at varying stages of the sponsorship process, and have disparate abilities to return to their home country. As another example, some Plaintiffs may indeed want to discuss their options with their families, while others may present distinct cultural or religious reasons to resist doing so. As the Supreme Court recently acknowledged, class certification should only occur where a Court can provide relief to each member of the class through a "single injunction or declaratory judgment." *Jennings v. Rodriguez*, --- S. Ct. --- , 2018 WL 1054878 (Feb. 27, 2018). The named Plaintiffs' own divergent experiences in the UAC program demand the denial of their motion for class certification. Consequently, Rule 23 precludes class certification.

LEGAL STANDARD FOR CLASS CERTIFICATION

Plaintiffs "must affirmatively demonstrate [their] compliance" with Rule 23 of the Federal Rules of Civil Procedure. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). That is, they must show: (1) "that the class [be] so numerous that joinder of all members is impractical"; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the named plaintiffs are typical of claims or defenses of the class; and (4) the named plaintiffs will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a). In addition, the proposed class must meet the additional requirements of Rule 23(b)(1), (2), or (3). *See Hartman v. Duffey*, 19 F.3d 1459, 1468 (D.C. Cir. 1994). In the instant case, Plaintiffs apparently seek to proceed using a class defined as "all pregnant unaccompanied immigrant minors ['UCs'] who are or will be in the legal custody of the federal government." ECF No. 18 at 1-2 (bracket in original).[1]

[1] Notably, Plaintiff's Complaint identifies a different class "of all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant during the pendency of this lawsuit." ECF No. 1 ¶ 47. That statement of the class has remained the same in Plaintiffs' Amended Complaint (ECF No. 1 ¶ 47), Second Amended Complaint (ECF No. 104 ¶ 62), and the proposed Third Amended Complaint (ECF No. 118-1 ¶ 82).

ARGUMENT

I. Plaintiffs Cannot Serve as Class Representatives Because Their Claims Are Moot.

In *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 73 (2016), the U.S. Supreme Court held that the putative class representative's "suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action." The same is true for Ms. Doe, Ms. Roe, and Ms. Moe. Generally speaking, Plaintiffs Doe, Roe, and Moe are inadequate class representatives because their claims have become moot for several independent reasons, including: (1) release from ORR custody (Ms. Doe, Ms. Moe and Ms. Roe); (2) achieving an age of majority (Ms. Doe and Ms. Roe); or (3) having already obtained an abortion (Ms. Doe, Ms. Roe, and possibly Ms. Moe).[2] By definition, their claims are moot, and they no longer have any rights to vindicate before the Court. So they cannot adequately represent the putative class comprised of UACs in ORR custody seeking abortion access.

In their renewed class certification motion, Plaintiffs contend that *Genesis Healthcare* "has no bearing" on this matter, overstating the D.C. Circuit's holding in *DL v. District of Columbia*, 860 F.3d 713, 722 (D.C. Cir. 2017). Plaintiffs' Renewed Class Certification Motion (ECF No. 121) at 11-12. Stated simply, the Court in *DL* did not erase the mootness doctrine as may apply to uncertified class actions in the absence of a justiciable controversy, and the general principle from *Genesis Healthcare* as applies to cases and controversies, or the lack thereof, thus remains valid, and applicable here. Importantly, in *DL*, far from informing the "inherently transitory" question, the Court expressly declined to address as unnecessary whether the "inherently transitory" exception applied to the mootness claim before the Court. *DL*, 860 F.3d at 722.

[2] Plaintiffs' Renewed Motion does not provide any details regarding whether Ms. Moe has, in fact, obtained an abortion.

Regardless, the "inherently transitory" mootness exception remains inapplicable here. Plaintiffs' own situations confirm this, inasmuch as the mootness of their claims belies the need to apply the exception. Plaintiffs have effectively conceded mootness, too, by raising the "inherently transitory" exception at all, since without mootness, there exists no need for an exception to it. Moreover, Ms. Roe's situation is irrelevant to this discussion, since she was never properly a plaintiff here. As to the other identified Plaintiffs, Ms. Moe's situation similarly fails, because she was released to a sponsor shortly after raising her claim. Plaintiffs Doe and Poe also received Court-ordered relief within two weeks of filing their claims, similarly mooting their claims. That the Court timely granted them relief, however, does not in and of itself engender the idea that their claims were "inherently transitory," and in fact confirms that, contrary to the purpose of the "inherently transitory" exception, they were able to timely obtain the relief they sought before doing so lost value to them. No record evidence suggests that similarly situated individuals could not obtain comparable results on an individual basis, consistent with the case-by-case nature of the subject individuals' situations. Absent more from Plaintiffs, the record here does not support finding that their claims, or those of anyone similarly situated, are so "inherently transitory" that the Court cannot timely rule on the class certification motion to preserve and sufficiently address such claims.

Further, the undeniable variety of circumstances each Plaintiff, or potential plaintiff, presents on this point alone cautions against both class certification and mootness avoidance, inasmuch as they are detained in different facilities, for varying lengths of time, at different stages of their pregnancies, with myriad personal issues that affect whether and why they may seek an abortion. Plaintiffs contend that the varying but brief amounts of time in which each Plaintiff sought an abortion and filed a claim before experiencing some event that altered their standing as a possible litigant materially drives this decision. Plaintiffs' Renewed Class Certification Motion

(ECF No. 121) at 10-11. This cabining of their claims ignores how distinct each Plaintiffs' case is, especially in light of the ORR's stated case-by-case review policy that requires delving into the totality of the circumstances for each individual, and leads to a differing results such as release to a sponsor.

To be sure, a pregnancy is fixed, and ending a pregnancy can moot out a claim. But the purpose of the "inherently transitory" mootness exception is to preserve access to judicial review, and proper resolution, of valid claims that would otherwise escape review. *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991). In other words, the principle exists to avoid consistently applying unconstitutional practices and policies to anyone, for no matter how brief a time. In *McLaughin*, for example, the Court addressed Riverside County's practice of detaining all individuals arrested without a warrant, *i.e.*, without a judicially-approved declaration of probable cause for their arrest, until their bail hearing, which coincided with their arraignment. *Id.* at 49. This potentially resulted in individuals being held for up to a week without a hearing. *Id.* The Court held that the county could reasonably combine probable cause hearings with bail and arraignment hearings, provided that those occurred within forty-eight hours of the initial detention. *Id.* at 58. Such a policy could be uniformly applied to all subject individuals.

In this matter, the case-by-case totality of the circumstances policy as applied to the Plaintiffs, in and of itself, is not unconstitutional, and without question belies any uniform application. Plaintiffs speculate, without record support, that ORR has a "uniform policy" that imposes an "unconstitutional ban" on abortions for minors in immigration custody. Plaintiffs' Renewed Class Certification Motion (ECF No. 121) at 6, 9. Unlike the policy as applied in *McLaughlin*, however, the system in place here varies as to each individual on a case-by-case basis, which is reasonable in light of the variety of circumstances each individual presents. Indeed, Plaintiffs cannot reasonably dispute that minors who enter immigration custody while pregnant do

so at varying stages of their pregnancy, hail from different countries, have different ages and levels of maturity, have different potential to be promptly released to a parent or sponsor, and carry with them differing religious and cultural backgrounds that directly impact their abortion-related decision-making. Some may absolutely desire an abortion, while others are unsure of the decision, and still others may indeed desire to carry their babies to term. Some may wish to involve their family members, while others may be unsure, and still others would prefer not to involve any family whatsoever – although as ORR has reasoned all may benefit from that kind of consultation, which presents issues very different from the types of parental consent issues that arise with respect to state abortion laws domestically, given that the parents here are not in custody of their children. They are not all the same age; they are not all of the same maturity level; they may present distinct mental health issues that perhaps affect their decision-making abilities. And Congress directed ORR to oversee all these issues. This non-exhaustive list of potential variations presents a voluminous and yet merely partial example of why the totality of the circumstances case-by-case policy ORR employs does not fit within the "inherently transitory" exception, inasmuch as what remains consistent in cases to which that exception applies is the uniform application of a single policy to all subject individuals with consistent results. A case-by-case policy is unequivocally non-uniform, especially inasmuch as the results vary so widely.

II. Plaintiffs Still Cannot Establish Numerosity.

Plaintiffs, in their renewed motion, say nothing in response to Defendants' prior numerosity statement. They vaguely identify minors in Arizona, Texas, and California, without providing further factual support or otherwise expressly adding them to the suit, and do not otherwise acknowledge the simple fact that the vast majority of pregnant UACs ultimately choose not to request an abortion, and therefore are not potential class members. *See* Defendants' Response to Plaintiffs' Motion for Provisional Class Certification and Notice, ECF No. 98.

Further, as previously stated, the addition of Jane Moe as a plaintiff did not increase the size of the putative class because her claims are moot, inasmuch as she has been released from ORR custody, leaving her free to take whatever further steps she may choose to obtain an abortion. And even if her claims were not moot, there would still be too few members of the putative class to demonstrate numerosity. *See generally* ECF No. 104. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986) (explaining that "while there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors") (internal punctuation omitted). Plaintiffs' suggestion that there have been six girls in the past six months only underscores the scarcity of such cases, just as the different circumstances each of those girls presented underscores the inappropriateness of class treatment here.

III. Plaintiffs Still Cannot Establish Commonality or Typicality.

Plaintiffs fail to establish the requisite commonality or typicality. In their Second Amended Complaint, Plaintiffs allege:

> Defendants have recently revised nationwide policies that allow them to wield an unconstitutional veto power over unaccompanied immigrant minors' access to abortion in violation of their Fifth Amendment rights. Under these nationwide policies, Defendants also force unaccompanied minors who request abortion to visit a pre-approved anti-abortion crisis pregnancy center, which requires the minor to divulge the most intimate details of her life to an entity hostile to her abortion decision, in violation of her First and Fifth Amendment rights. Defendants also force minors to notify parents or other family members of their request for abortion and/or the termination of their pregnancy, or notify family members themselves, in violation of the First and Fifth Amendments.

Plaintiffs' Second Amended Complaint, ECF No. 104 at 2. They claim that this policy gives rise to three "common issues of law, including but not limited to: (i) whether ORR's policy of exercising a veto power over a UC's abortion access violates class members' constitutional rights; (ii) whether HHS's policy of requiring a forced visit to an anti-abortion crisis pregnancy center violates class members' constitutional rights; and (iii) whether disclosing – or forcing the class members to

disclose – to parents or immigration sponsors their abortion decisions violate class members' constitutional rights." *Id.* at 14. Plaintiffs' claims fail for two reasons.

First, Plaintiffs have not shown such a policy even exists. In their Second Amended Complaint, they merely allege that "ORR revised their policies to prohibit all federally funded shelters from taking 'any action that facilitates' abortion access for unaccompanied minors in their care without 'direction and approval from the Director of ORR.'" ECF No. 104 at 10. Their renewed motion for class certification repeats this contention. ECF No. 121 at 8-9. Ab initio, longstanding HHS policy requires that ORR approve all significant, non-exigent medical procedures (including, but not limited to, terminations of pregnancy) for minors in its custody. ECF No. 10 at 4. Congress charged HHS with serving in the role of the child's legal custodian. As part of that role, HHS is directed to place UACs "in the least restrictive setting that is in the best interest of the child," 8 U.S.C. § 1232(c)(2)(A), while in HHS custody—that is, until they are released to a suitable sponsor, obtain lawful status, or leave the country.[3] *See* 6 U.S.C. § 279(g); 8 U.S.C § 1232(b)(1), (g). In placing children in the least restrictive setting, HHS also "consider[s] danger to self, danger to the community, and risk of flight." *Id.*

Within HHS, ORR has long been responsible for the care and placement of UACs who enter the United States illegally and are "in federal custody by reason of their immigration status." 6 U.S.C. § 279(b)(1)(A). ORR's Director is responsible for "ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child," and for "implementing policies with respect to the care and placement of unaccompanied

[3] Once UACs attains the age of 18 years, they are transferred to DHS custody, which then is directed to consider placement in the "least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight." 8 U.S.C § 1232(c)(2)(B). The statute also provides that "such aliens shall be eligible to participate in alternative to detention programs, utilizing a continuum of alternatives based on the alien's need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home." *Id.*

alien children." *Id.* § 279(b)(1)(A), (B). As part of Congress's efforts to protect the child, federal law provides that the Director "shall not release" unaccompanied minor children "upon their own recognizance." *Id.* § 279(b)(2)(B). Organizations that provide shelter and services to unaccompanied minor children do so at ORR's direction and in compliance with ORR policies and procedures. *See* ECF No. 10-1. Notably, and in line with this standard, ORR mandates that personnel obtain necessary medical treatment for UACs faced with medical emergencies, including transporting them offsite where necessary. *See* U.S. Department of Health and Human Services, ORR Guide: Children Entering the United States Unaccompanied ("ORR Guide") at § 3.4.5, https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied (last visited January 22, 2018) (providing, in cases of "medical emergencies," defined as "a serious medical condition caused by injury, illness, or toxic exposure that is life threatening in nature," that UAC may be transported to off-site medical care provider and accommodations made to "implement treatment recommendations"). The ORR Guide also addresses certain routine care, certain family planning services, medical examinations, appropriate mental health care, immunizations, and prescribed medications and special diets, but does not address elective serious medical procedures, outside of an emergency. *See* ORR Guide at § 3.4.

This broader policy has been in effect for several years. The fact that ORR requires approval from the Director of ORR, without more, falls short of bestowing upon Director Lloyd an unconstitutional veto in any application. There is nothing unconstitutional about the Director of ORR, whom Congress charged with the care of unaccompanied minors in federal custody, being involved in their decision to seek an elective abortion.

Similarly, there is nothing unconstitutional about ORR providing pregnancy counseling in its custodial capacity in a manner that favors life, or involving the minor's parents in her home country when possible. Again, Director Lloyd testified that every elective abortion request is

evaluated on a case-by-case basis, based on the totality of the circumstances for each individual. Plaintiffs' Exhibit N, ECF No. 121-15 at 18-19 and 23-24 (Dep. Tr. Of S. Lloyd at 62:14-69:15, 82:9-86:4). And the ultimate goal, as is always the case when dealing with adjudicating major life decisions involving minors, is to act in the child's best interests. *Id.* at 152:21-153:8; *Belloti v. Baird*, 443 U.S. 622, 634-40 (1979) (discussing how minors require special treatment under the law due to their "lack [of] experience, perspective and judgment" necessary to make critical life decisions, and thus finding that states may reasonably require parental consultation for a minor seeking an abortion). Plaintiffs further complain that the case-by-case policy, in practice, amounts to coercion. *See* ECF No. 121 generally. The record, however, belies any such claim, and ignores the reality government agencies interacting with minors face, as acknowledged in *Belloti*. While Plaintiffs contend that the unidentified Arizona minor was "coerced" to involve her parents, *see* ECF No. 121 at 4, the evidence shows that she was "offered" counseling, "to which [she] agreed;" and importantly, her objection was that her mother would disown her upon learning that she was pregnant, when in reality her mother was supportive. Plaintiffs' Exhibit A, ECF No. 121-2 at 2-3. Similarly, contrary to Plaintiffs' coercion claim, the Texas minor agreed to inform her mother and wanted to do so personally, after having originally objected to doing so. Plaintiffs' Exhibit G, ECF No. 121-8 at 2. Plaintiffs further mischaracterize the record as to Jane Roe, claiming that ORR required that her family members be notified of her pregnancy and abortion decision, even absent her consent. ECF No. 121 at 5 (citing Plaintiffs' Exhibit M, ECF No. 121-14 at 2-5). The correspondence to which Plaintiffs refer in fact describes how ORR should provide the described notice to Jane Roe's sister, who indeed was already aware and supportive of Ms. Roe's decision, in light of Ms. Roe's difficult familial situation. *Id.* at 4-5. The correspondence states that "prior to her journey [to the United States, Ms. Roe] lived with her sister who [Ms. Roe] informed about the pregnancy and supports her decision to terminate." *Id.* ORR Director Lloyd then expressly

provided that "The sister should receive the notification of the pregnancy and the termination request, in the same way as if she were a parent." *Id.* at 3. Plaintiffs' suggestion that "coercion" is present where ORR pursues the notification of someone to whom Ms. Roe, herself, had already voluntarily disclosed her pregnancy and her desire to terminate, essentially confirming information she already knows, is beyond the pale.

To be sure, Plaintiffs describe other situations in which minors objected to their parents being notified of their child's wish to procure an abortion, but that is precisely the scenario discussed, and authorized, in *Belloti*, 443 U.S. at 634-40, albeit subject to reasonable accommodations. Moreover, the situation ORR faces here is far different than a more-typical case, as was the situation in *Belloti*, in which a parent remains in custody of their child, and can thus exercise far more persuasive authority over the child's decision-making. The children here are sometimes thousands of miles away from their nearest relative, and located in another country. The minors typically lack financial resources to provide even basic care for themselves. The children often do not speak English, and lack the ability to join the workforce for lack of authority to do so, as well as for lack of job-skills. While they may have had at least some semblance of a support network in their home country, the children, upon arrival in the United States, rarely have anyone trustworthy to whom they can turn for assistance or guidance. To that end, as the Supreme Court recognized in *Belloti*, 443 U.S. at 641 n. 21 (citing *Doe v. Bolton*, 410 U.S. 179 (1973)), the attending physician plays a crucial role in the abortion process, but children in general lack the means or experience dealing with medical professionals to select only ethical and competent medical care. These unaccompanied minors face all of the further complications as detailed above, on top of not knowing to whom they can turn and trust for professional medical care. Congress called upon ORR to step in to fill these voids. 6 U.S.C. § 279(b)(1)(A).

The Supreme Court has long recognized that parents play a hugely critical role in preparing their child to be a responsible member of society, retaining both a right to do so, but also a "high duty" to mold their child into a socially responsible citizen. *Id.* at 637-38 (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)). Without question, the role of the parent as the steward for their child's maturation remains paramount. *Belloti*, 443 U.S. at 638 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *see also Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (explaining that constitutional interpretations have long acknowledged that parental authority over child-rearing embodies a fundamental building block of American society). Parents retain this role because, as confirmed through scientific and sociological studies, children lack the maturity and sense of responsibility central to making critical life-decisions. *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *see also Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (noting that children lack the experience, perspective, and judgment of adults) (citation omitted). Parents typically bridge this gap, so as to avoid requiring State involvement in personal decision-making and childhood development if at all possible. *Ginsberg*, 390 U.S. at 639 (citing *Prince*, 321 U.S. at 166).

Here, ORR is called upon to act as the ultimate decision-maker, often in the absence of contact with any parent or responsible family member. The minors in ORR custody, by definition, are unaccompanied – essentially parentless – and thus wards of the State. Similarly absent is the risk of retaliation or maltreatment from ORR, should the minor seek action ORR does not recommend or endorse after proper review. And perhaps most substantially missing here is the parental role of assuaging the impact of such a substantial life event on a young person. Further complicating this situation, and rendering it fundamentally distinct from the wide variety of state laws and cases on the subject of parental or familial notification for minors seeking abortion, is the fact that ORR will always know about the abortion request under the circumstances. A majority of

states, thirty-seven, require minors to notify their parents that they intend to seek an abortion, while also providing for various judicial bypass procedures to that requirement. *See* Guttmacher Institute, Parental Involvement in Minors' Abortions, State Laws and Policies as of March 1, 2018, https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions (last visited March 12, 2018). In some states, absent a requirement that the parents receive notice, or if the child employs one of the judicial bypass options, the parents may never know their child was even pregnant. ORR, as the custodian and caretaker, will always be aware of an unaccompanied minor's intent to seek an abortion. Congress, by appointing ORR as both the de jure caregiver and the de facto parent for unaccompanied pregnant minors, placed ORR squarely in the middle of an already complicated situation, and the judicial bypass option simply is inapposite. Handling this situation for ORR requires seeking to maintain a delicate balance between the best interests of the child, and ORR's dual role as both a government agency and a de facto parent. The case-by-case totality of the circumstances method accomplishes this goal.

Again, Courts have long recognized that minors generally lack the maturity or life experience to knowingly make difficult life decisions, and involving experts, counselors, and parents or other family members, goes directly to enabling action that is in the child's best interests. *Id.* Doing so, after careful consideration of the totality of the circumstances, fulfills precisely the role government plays in resolving such difficult situations involving individuals legally incapable of independently handling them. *Id.* Congress, by calling upon ORR to act in the child's best interests, bestowed upon ORR the weighty responsibility of essentially stepping in to act as these children's parents. As such, the facts, as Plaintiffs allege in their Second Amended Complaint, and reiterated in their latest class certification motion, simply do not establish the existence of a nationwide policy that is tantamount to an unconstitutional veto over the constitutional rights of unaccompanied minors in their care.

Second, even if such a policy existed, its constitutionality is not a question that can be answered on a class-wide basis because the undue burden analysis requires an individualized determination. To show commonality, "what matters . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores*, 564 U.S. at 350 (internal quotation omitted). Further, "commonality is established by a common issue the resolution of which will advance the litigation, but is lacking where the case will turn on a series of individualized inquiries." *Disability Rights Council of Greater Washington v. WMATA*, 239 F.R.D. 9, 26 (D.D.C. 2006) (quoting *Love v. Johanns*, 439 F.3d 723, 730 (D.C. Cir. 2006) (internal quotations and citations omitted).

Moreover, the Supreme Court recently reiterated that class certification applies "'only when a single injunction or declaratory judgment would provide relief to each member of the class.'" *Jennings*, 2018 WL 1054878 at * 19 (quoting *Wal-Mart Stores*, 564 U.S. at 360). No such single result is possible here, especially in light of the conceded variances in circumstances as to each individual Plaintiffs have identified, and certainly impossible with respect to the speculative unidentified similarly-situated individuals Plaintiffs posit exist.

Indeed, whether any alleged ORR policy imposes an undue burden requires an individualized analysis of factors including the ability to obtain a sponsor, the age of the minor, and the state of residence. The various circumstances of the named Plaintiffs only bears out the reality. For instance, Ms. Moe, who was released to a sponsor just two weeks after requesting an abortion, ECF No. 114, would be unable to establish a constitutional violation, given that the Supreme Court has already approved of state law regimes that take longer to resolve whether a child may consent to an abortion. *See Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) (acknowledging that bypass "procedure may require up to 22 days in a rare case" and explaining

that Court has "upheld a Missouri statute that contained a bypass procedure that could require 17 calendar days plus a sufficient time for deliberation and decisionmaking at both the trial and appellate levels"); *id*. at 532 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting) ("Ohio's judicial-bypass procedure can consume up to three weeks of a young woman's pregnancy."). This illustrates that the constitutional analysis for each individual UAC is different, indicating that there would be different "answers" to the allegedly common questions about ORR's alleged policy, thus rendering commonality lacking. *See Jennings*, 2018 WL 1054878 at * 19; *see also Wal-Mart Stores*, 564 U.S. at 350. For these reasons, Plaintiffs cannot establish commonality or typicality for class certification.

CONCLUSION

Accordingly, this Court should deny Plaintiffs' Renewed Motion for Class Certification and a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I caused a copy of the foregoing Defendants' Opposition to Plaintiffs' Renewed Motion for Class Certification and a Preliminary Injunction to be filed with the Clerk of the Court using the Court's CM/ECF system. Counsel for Plaintiffs are registered CM/ECF users, and will be served exclusively through that system.

/s/ Michael C. Heyse
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